Supreme Court, U.S.
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No. 95-1528

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

Harris County Appraisal District and
Harris County Appraisal Review Board,
Petitioners,

v.

Virginia Indonesia Company,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a direct tax on export goods that are merely in transit through a state on their way to a foreign country is an "impost or duty" on an "export" prohibited by the Import-Export Clause in Article I, Section 10, Clause 2, of the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners:

Harris County Appraisal District
Harris County Appraisal Review Board

Respondent:

Virginia Indonesia Company

RULE 29.6 LISTING

The following are parent corporations related to **Virginia Indonesia Company** in which outside persons or investors might have an interest:

Virginia Indonesia Company is a wholly-owned subsidiary of **VICO 7.5, Inc.**, which is a wholly-owned subsidiary of **ENSTAR Corporation**.

ENSTAR Corporation is a wholly-owned subsidiary of **Unimar Company**, a Texas general partnership jointly owned by **Unistar, Inc.**, and **LASMO (USTAR) Inc.**

Unistar, Inc., is a wholly-owned subsidiary of **Union Texas Petroleum Holdings, Inc.**

LASMO (USTAR) Inc., is a wholly-owned subsidiary of **LASMO America Limited**, which is a wholly-owned subsidiary of **LASMO plc**.

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OPINION BELOW

The opinion of the Supreme Court of Texas is reported at 910 S.W.2d 905 (Tex. 1995).

STATEMENT OF THE CASE

The statement of Petitioners Harris County Appraisal District and Harris County Appraisal Review Board ("Harris County") contains omissions or inaccuracies, and Respondent Virginia Indonesia Company ("VICO") offers the following clarifications:

1. Harris County omitted or distorted several salient facts concerning the nature of VICO's business and the in transit status of the goods in question. First, VICO is not in the business of importing or exporting goods. VICO is the operator and agent for an Indonesian joint venture that explores for oil and gas in the Republic of Indonesia. It is this Indonesian joint venture that purchases goods through VICO. Second, VICO derives no profits from its procurement of the goods; it is merely reimbursed. VICO has no authority to divert the goods for use in the United States. Furthermore, VICO has no authority to delay the goods from being shipped to their final destination in the Republic of Indonesia. If the goods are deemed to be nonconforming, they are returned to the vendor. Therefore, the continuity of transit is not broken at any point.

2. Harris County also omitted a fact which is key to the "one voice" policy addressed by the Texas Supreme Court. Under the Decree of the President of the Republic of Indonesia 14A Year 1980 on the Implementation of the State Revenues and Expenditures Budget, certain of VICO's goods present at the export packer on January 1, 1991, are subject to import duties and taxes in Indonesia.

3. Harris County's assertion that "Local inspection enables the goods to avoid customs inspection upon their arrival in Indonesia," is inaccurate and not part of the record. This erroneous statement originally appeared in the Texas court of appeals' opinion and its origin is unknown. What the record indicates is that, under Indonesian law, a pre-shipment inspection must be conducted in the country of origin and any problem must be corrected at the country of origin before Indonesia will accept the goods. Indonesian law also requires that a list of goods and

equipment being exported must be submitted on a quarterly basis to the Indonesian government for approval prior to export from the country of origin. This process is not for the business convenience of VICO; it is a legal prerequisite for goods being imported into Indonesia.

4. Harris County's statement that "VICO has goods at the export packer's yard throughout the year" implies that the **same** goods are sitting there throughout the year. Actually, VICO moves various shipments of goods through the export packer in the course of a year, so that varying types and quantities of goods are at the export packer's facilities at any given time during the year, but the same goods do not remain at the export packer's facility for the entire year.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Article I, § 10, cl. 2, provides:

> No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except that which may be absolutely necessary for executing inspection Laws . . .

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE TEXAS SUPREME COURT'S OPINION DOES NOT CONFLICT WITH PREVIOUS U.S. SUPREME COURT DECISIONS

Since at least 1827, this Court has recognized that the constitutional prohibition on the states to lay imposts or duties on imports and exports may conflict with a state's acknowledged power to tax persons and property within its territory. *See Brown v. Maryland*, 25 U.S. 419, 441 (1827). Decisions by this Court involving the Import-Export Clause have been fact specific. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67 (1974) ("Of necessity, the inquiry has usually been a factual one."). Cases in this area have turned on two separate but related factors:

- whether the goods are **in transit** at the time of taxation; and

- whether the tax is a **direct** tax on the **goods** themselves.

A chart of Supreme Court decisions in this area, organized according to these factors, is attached as an Appendix. This chart clearly illustrates that this Court has consistently looked to these factors when analyzing whether the tax was valid under the Import-Export Clause. The threshold question in this analysis is:

> **Is the tax in question a direct tax on goods "in transit"?**

If so, the tax is invalid and no further inquiry is necessary. If the tax is **not** a direct tax and/or is not on goods in transit, then the Court has framed a second question:

> **Does the tax offend any of the policies underlying the Import-Export Clause?**

In this case, Harris County assessed an ad valorem property tax on goods which VICO was exporting from the United States to the Republic of Indonesia. Under Import-Export Clause analysis, this tax is a direct tax on exports merely in transit through the state of Texas. Therefore, applying the basic "in transit" test, the Texas Supreme Court correctly held that these goods are immune from such a tax. That holding does not conflict with the body of case law from this Court on the Import-Export Clause.

A. The Texas Supreme Court's opinion does not conflict with previous rulings of this Court concerning goods that are no longer in transit.

The Texas Supreme Court's opinion does not conflict with opinions of this Court upholding taxes, such as *Coe v. Town of Errol*, 116 U.S. 517 (1886), *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286 (1949), *Empressa Siderurgica v. County of Merced*, 337 U.S. 154 (1949), *Kosydar v. National Cash Register*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), *Limbach v. Hooven & Allison Company*, 466 U.S. 353 (1984), and *R. J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130 (1986). All of those cases involved goods that were **not in transit at the time of taxation**. Accordingly, those goods were properly excluded from the protection of the Import-Export Clause.

In *Coe,* this Court established the in transit test to determine whether a tax being applied by a state directly to imports or exports is constitutional. *Coe* recognized that the taxing power of the state ceases when goods are in transit to a foreign country or to another state.

> This question does not present the predicament of goods in course of transportation through a state, though detained for a time . . . **Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution**.

Coe, 116 U.S. at 525-527. Conversely, *Coe* held that goods that are not in transit are subject to taxation because they are "part of the general mass of property in the state." *Coe*, 116 U.S. at 527. This Court has consistently applied this basic in transit test in Import-Export Clause cases.

Kosydar is the last case where this Court specifically dealt with export goods under the Import-Export Clause. In *Kosydar*, this Court again stressed that export goods that are in transit are exempt from taxation. *Kosydar*, 417 U.S. at 57. This principle has **never** been overruled by this Court.

Harris County has conceded that the goods in this case are in transit. *See* Petition for Writ of Certiorari, pp. 7-8. However, Harris County claims that *Michelin* abandoned the in transit test altogether in the determination of whether goods are exempt from taxation under the Import-Export Clause. Harris County's argument suggests that *Michelin* effectively overruled ninety years of reasoning beginning with *Coe*, without expressly overruling any of those cases.

Although *Michelin* appears to change the focus of Import-Export Clause analysis in some cases, this change is not as extensive as Harris County claims, for several reasons. First, the three policy concerns introduced in *Michelin*[1] are **expressly limited to cases where the goods are no longer in transit** and/or where the tax is not on the goods themselves. *Michelin* still requires a threshold determination of whether the goods are imports or exports merely in transit through the state at the time of taxation. *R. J. Reynolds*, 479 U.S. at 154-55. If so, they are exempt from taxation and no further analysis is required.

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[1] *Michelin* discussed three concerns sought to be alleviated by the Framers of the Constitution by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power:

> (1) the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;
>
> (2) import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
>
> (3) harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

Michelin, 423 U.S. at 285-286.

Second, *Michelin* has been described as shifting the analysis from whether the goods have lost their status as imports or exports to an analysis of the nature of the tax. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 752, 760 (1978). However, this inquiry necessarily involves some analysis of the goods themselves. The *Michelin* analysis only applies to **goods** no longer in transit and/or to situations where the tax is not on the **imports** or **exports** themselves.

Third, Harris County argues that both *Michelin* and *Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095 (1993) replaced the in transit test with a three-part "test" to be applied in **every** case involving the Import-Export Clause. *See* Petition for Writ of Certiorari, pp. 5-6, 8-9, 11. This argument ignores key factual distinctions in *Michelin* and *Itel* that were critical to this Court's analysis in those cases.[2] Both *Michelin* and *Itel* involved **imports** which at the time of the tax were **no longer in transit**. Although *Michelin* may have articulated some factors to consider when the tax is not

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[2] Further, if this Court uniformly applied the *Michelin* analysis to all Import-Export Clause cases, it would risk making the following type of mistakes made in *Low v. Austin*, 80 U.S. 29 (1872), when the Court misinterpreted *Brown v. Maryland*. "[T]he Court in Low v Austin ignored the warning that the boundary between the power of States to tax persons and property within their jurisdictions and the limitations on the power of the States to impose imposts or duties with respect to 'imports' was a subtle and difficult line which must be drawn as the cases arise. Low v Austin also ignored the cautionary remark that, for those reasons, it 'might be premature to state any rule as being universal in its application.'" *Michelin*, 423 U.S., at 298-299.

a direct tax on goods in transit, that analysis is limited to a certain set of facts.[3]

Finally, neither *Itel*, nor *Michelin*, nor any other United States Supreme Court case since, has concluded that the in transit test utilized by this Court should be abandoned. The *Itel* Court simply stated that it was "inapplicable here." *Itel*, S.Ct. at 1106. Likewise, the *Michelin* Court expressly limited its holding to imported goods "no longer in transit." *Michelin*, 423 U.S. at 302. Accordingly, the in transit test is still the proper analytical framework for determining whether exports under the Import-Export Clause are exempt from taxation and should be followed on the basis of *stare decisis* alone.

Michelin clearly sets out both the genesis of the "in-transit" test and the basis for its continued viability:

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden

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[3] It is unclear what the rationale was behind the *Michelin* Court's discussion of the three policy considerations, or whether that Court even intended its discussion to become the foundation for a test attributed to *Michelin* by later decisions. Regardless of the rationale, it is not necessary for the Court to apply the additional criteria in *Michelin* in order to determine the viability of the tax in this case because this case is factually distinguishable from *Michelin*. However, as a practical matter, it is difficult to imagine a case involving exports in which the more complicated *Michelin* analysis, originally developed for imports no longer in transit, would produce a different result from the basic in transit test recognized since *Coe*. <u>*See*</u> Appendix.

> commerce both among themselves and with foreign countries very much as they pleased.
>
> . . .
>
> An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. **In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.** A nondiscriminatory ad valorem property tax [on goods no longer in transit] obviously stands on a different footing, and **to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed**.
>
> . . .

Michelin, 423 U.S. at 283, 289-290 (emphasis added).

Since Harris County has conceded for purposes of this appeal that the export goods in this case are in transit, the Texas Supreme Court properly held the ad valorem tax on the goods in question was unconstitutional under the Import-Export Clause.

B. The Texas Supreme Court's opinion does not conflict with previous rulings of this Court concerning indirect taxation relating to imports or exports.

The Texas Supreme Court's opinion does not conflict with *Washington Stevedoring* or with *Itel* because those cases involved an **indirect** tax on a **business activity** related to imports or exports within the state, whereas this case involves the **direct** taxation of **exports**.

In *Washington Stevedoring*, this Court stated:

> The Court in *Michelin* qualified its holding with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 U.S. at 302. Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and *Michelin*. First, the activity taxed here occurs while imports and exports are in transit. Second, however, the tax does not fall on the goods themselves. The levy reaches only the business of loading and unloading ships. . . . Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

Washington Stevedoring, 435 U.S. at 755 (footnote omitted). Drawing a distinction between a direct tax on in transit goods, and a tax on the business activity of handling goods in transit, the Court upheld the stevedoring tax. *Id.*, 435 U.S. at 755 (stating that the "immunity of services incidental to importing and exporting [is] not so broad as the immunity of the goods themselves"). In so doing, *Washington Stevedoring* applied the *Michelin* analysis to cases involving the indirect taxation of imports or exports.

The question presented by Harris County of "Whether the Import-Export Clause prohibits state and local ad valorem property taxation of goods in transit in the stream of export even if the tax offends none of the policies underlying the Clause" is **not** the question presented by *Washington Stevedoring*, 435 U.S. at 755. The question posed by *Washington Stevedoring* was "whether a[n indirect] tax relating to goods in transit would be an 'Impost or Duty' even if it offended none of the policies behind the [Import-Export] Clause." This question was correctly answered by the *Washington Stevedoring* Court, holding that a tax that does not fall on the goods themselves is not a prohibited impost or duty. *Washington Stevedoring*, 435 U.S. at 755. However, the question presented to the Court by Harris County concerns a **direct** tax on the **in transit** goods themselves and, therefore, presents an impossibility under *Michelin*.[4] Since a direct tax on goods in transit offends the

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[4] Harris County's second question presented is "Whether an ad valorem property tax usurps the Federal Government's ability to 'speak with one voice when regulating commercial relations with foreign governments' for the sole reason that it is levied on goods in transit in the stream of export." However, this question must be addressed **only** when the facts of a case present a tax related to imports or exports which are no longer in transit. Since the goods in this case are exports in transit

threshold test under *Michelin*, it would be impossible for a direct tax on goods in transit to be an "impost or duty" without offending the policies behind the Import-Export Clause. Furthermore, the term "imposts or duties" in the Import-Export Clause was intended to embrace taxation that creates **any** of the evils the Clause was intended to eliminate. *Michelin*, 423 U.S. at 293-294. Accordingly, if a tax is on goods themselves, merely in transit through a state, it is a constitutionally prohibited "impost or duty" *per se*.

Like *Washington Stevedoring*, *Itel* involved an indirect tax on a business activity, not a tax on the goods themselves. Accordingly, *Itel* rejected the argument that "the tax violated the prohibition on the **direct** taxation of imports and exports 'in transit,'" holding that "the tax in question is **not** a tax on importation or imported goods . . ." *Itel*, 113 S.Ct. at 1106 (emphasis added).

The most recent federal case that addresses the constitutionality of a direct tax on exports in transit is *Louisiana Land & Exploration Co. v. Pilot Petroleum*, 900 F.2d 816 (5th Cir. 1990), *cert denied*, 498 U.S. 897 (1990). In addition to recognizing that *Michelin* limited its analysis to taxes levied on goods no longer in transit, the Fifth Circuit

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and, therefore, immune from taxation under *Michelin's* threshold determination, this Court need never address Harris County's second question. There can be no doubt that, "The tax imposed on VICO's goods transgresses the 'one voice' policy of the import-export clause." *Virginia Indonesia Co. v. Harris Cty.*, 910 S.W.2d 905, 914-915 (Tex. 1995); *See Louisiana Land & Exploration Co. v. Pilot Petroleum*, 900 F.2d 816, 821 (5th Cir. 1990), cert. denied, 498 U.S. 897 (1990) ("To permit any and every state to impose a direct tax on goods in the export stream would circumvent this [one voice] objective.").

drew the additional distinction that the Import-Export Clause was designed to protect against direct taxes on goods in the export stream.

The tax in this case is not like the tax on a business or occupation related to imports or exports in *Washington Stevedoring* and *Itel*. Instead, as in *Louisiana Land*, it is a direct tax on the export goods themselves while they are in transit. Accordingly, the tax in this case constitutes a transit fee on the privilege of moving goods through the state of Texas. As such, it creates one of the evils sought to be prevented under the Import-Export Clause. *Michelin*, 423 U.S. at 290. Since this tax is distinguishable from the taxes upheld in *Washington Stevedoring* and *Itel*, the holding of the Texas Supreme Court does not conflict with those cases.

C. The Texas Supreme Court's opinion is entirely consistent with previous rulings of this Court concerning direct taxation of export goods in transit.

The Texas Supreme Court's opinion is entirely consistent with *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), and *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). In those cases, this Court held that a **direct** tax on **export** goods **in transit** violated the Import-Export Clause of the United States Constitution. *A. G. Spalding* and *Richfield* are the only cases in the Appendix that are factually analogous to this case. *A. G. Spalding*, 262 U.S. at 69-70; *Richfield*, 329 U.S. at 78-79.

In *A. G. Spalding*, this Court decided that **delivery of baseballs and bats to an export carrier for shipment** to

Venezuela constituted a significant "step in exportation," and exempted the goods from a federal revenue tax, stating:

> The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result.

A. G. Spalding, 262 U.S. at 69-70.

Richfield reaffirmed the rule established in *Coe*, holding that a state retail sales tax assessed against a seller of oil delivered in the state to a foreign purchaser was a prohibited impost upon an export. The Court declared that the Import-Export Clause's requirement that foreign commerce be involved was met, since the oil was sold for shipment abroad.

The determinative question in this case was whether the goods were in transit at the time of taxation. The Texas Supreme Court correctly determined VICO's goods are **in transit**, are the subject of foreign export at the time of taxation, and that the Harris County ad valorem tax is a **direct tax** assessed on **exports** within the meaning of the Import-Export Clause. Therefore, the tax is unconstitutional.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT REACHED BY THE TEXAS SUPREME COURT IS CONSISTENT WITH SOUND POLICY

The policy reflected in the Federal Constitution against state interference with the export process requires that the goods in this case be protected from taxation. If this

were not so, then all goods in transit to a foreign country would be subject to taxation as soon as they cross into the taxing state. The only inquiry would be whether the goods had crossed the state line. If the Import-Export Clause were interpreted by this Court as narrowly as recommended by Harris County, the Clause would be effectively emasculated. Even nondiscriminatory taxation of exports constitutes a very real threat to foreign commerce. If the exportation of goods through coastal states of these United States becomes prohibitively expensive because of transit fees such as those sought to be imposed by Harris County, the ultimate consequence will be that the Republic of Indonesia and other similarly situated countries or businesses will go elsewhere for their goods. The effect of these transit fees will be to place American businesses at a competitive disadvantage with other goods in the international marketplace.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT REACHED BY THE TEXAS SUPREME COURT WAS CORRECT FOR OTHER REASONS

The trial court granted VICO's motion for summary judgment on the basis that the goods are exempt from taxation under the Import-Export Clause and the Commerce Clause of the United States Constitution and under Section 11.01 of the Texas Tax Code. The Texas Supreme Court did not reach the latter two issues because it decided that the tax violated the Import-Export Clause of the United States Constitution. Certiorari should be denied because the result below was also correct on the basis of the Commerce Clause and the Texas Tax Code.

As noted previously, the determinative question in this case is whether the goods were in transit at the time of taxation, which the Texas Supreme Court answered in the affirmative, and which Harris County concedes in this appeal. The court below correctly determined this case on the Import-Export Clause issue and, appropriately, did not reach an analysis of the Commerce Clause and the Texas Tax Code. Nevertheless, that constitutional provision and that state statute provide two additional reasons for holding that the tax is invalid and for denying the writ of certiorari.

CONCLUSION

For these reasons, Respondent VICO requests that Harris County's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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TABLE OF IMPORT-EXPORT CLAUSE CASES

SUPREME COURT CASE	TYPE OF TAX	TAXED ITEM	TRANS-PORT	IN-TRANSIT?	TAX VALID?
Coe v. Errol (1886)	Direct	Goods	Exports*	No	Yes
***A. G. Spalding* (1923)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**
***Richfield* (1946)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**
Joy Oil Company (1949)	Direct	Goods	Exports	No	Yes
Empressa (1949)	Direct	Goods	Exports	No	Yes
Kosydar (1974)	Direct	Goods	Exports	No	Yes
Michelin (1876)	Direct	Goods	Imports	No	Yes
Wash. Stevedoring (1978)	Indirect	Services	Imp/Exp	N/A	Yes
Hooven II (1984)*	Direct	Goods	Imports	No	Yes
R. J. Reynolds (1986)	Direct	Goods	Imports	No	Yes
Itel (1993)	Indirect	Services	Imports	N/A	Yes
***VICO* (1996)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**

*Although classified as "exports" by the Court, *Coe* involved interstate commerce from New Hampshire to Maine.